IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 4TH JUNE 2007 / 14TH JYAISHTA 1929

AR.No. 53 of 2004()

APPLICANT:

SREE DHANYA CONSTRUCTION COMPANY,
31/747, SASTHAMANGALAM, THIRUVANANTHAPURAM-695 010
REPRESENTED BY THE MANAGING PARTNER,
SRI.G.CHANDRA BABU.

BY ADV. SRI.K.L.VARGHESE

RESPONDENTS: OPPOSITE PARTIES:

---

1. THE UNION OF INDIA,
REPRESENTED BY THE CHIEF ENGINEER (CONSTRUCTION),
SOUTHERN RAILWAY, THYCAUD, THIRUVANANTHAPURAM.

2. THE GENERAL MANAGER,
SOUTHERN RAILWAY, HEAD QUARTERS OFFICE,
PARK TOWN, CHENNAI-600 003.

BY ADV. SRI.ALEXANDER THOMAS, SC, RAILWAYS

THIS ARBITRATION REQUEST HAVING BEEN FINALLY HEARD ON 04/06/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

PIUS C. KURIAKOSE, J.

.....

Arbitration Request No.53 OF 2004

.....

DATED THIS THE 4TH JUNE, 2007

O R D E R

This request for appointment of an independent arbitrator for settling the disputes between the parties M/s.Sree Dhanya Construction Company and the Southern Railway relating to execution of the work of "Doubling of Track between Shornur and Mangalore – Mangalore Thanur Section – Earth working in forming embankment and cutting, Construction of minor bridges, retaining wall, masonry drains etc. between Pattambi (exit) and Karakkad (exit) stations" is made under sub-sections (5) and (6) of Section 11 of the Arbitration and Conciliation Act, 1996 on the ground that the 2nd respondent-General Manager, Southern Railway who is the appointing authority vested with power to appoint arbitrator in terms of the agreement has failed to exercise such power within the prescribed period and hence forfeited his right to do so. Annexure-A4 is attested true copy of the arbitration clause in the agreement. Annexure-A1 is copy of the letter dated 11.2.2004 by which the arbitration clause was invoked and the claims of the applicant were intimated to the respondents. Annexure-A2 is copy of the letter dated 26.6.2004 sent by the applicant to the

2nd respondent when it was found that there was no response to Annexure-A1 in spite of elapse of months. It is pointed out that as per the terms of the agreement, after the expiry of 120 days but within 180 days of Annexure-A1, the applicant is entitled to seek for appointment of arbitrator. Annexure-A3 is the postal acknowledgment receipt pertaining to Annexure-A2. The applicant submits that the appointing authority failed to exercise the power under the agreement in spite of Annexure-A2 within thirty days.

2. A counter affidavit has been filed on behalf of the respondents wherein Clauses 63 and 64 of the General Conditions of Contract (GCC) are specifically referred to and it is stated that the 2nd respondent has nominated a panel of 4 Gazetted Officers as per the above Clauses. Annexure-R1 is copy of the letter dated 19.10.2006 issued to the applicant in that regard. It is contended that the applicant has to choose two names out of the above four included in the panel and the Railways shall appoint one out of the applicant's nominee and will appoint the balance number of arbitrators in terms of Clause 64(3(a)(ii) of the GCC.

3. I have heard the submissions of Sri.K.L.Varghese, learned

counsel for the applicant and Sri.Alexander Thomas, learned Standing Counsel for the Railways.

4. Sri.Alexander Thomas would submit that since the conditions of the contract between the parties provide that Gazetted Officers of the Railways themselves shall be arbitrators, this Court will not be justified in appointing anybody other than them as arbitrators. The Standing Counsel relied on the judgment of the Supreme court in **Union of India v. M/s.V.S.Engineering (P) Ltd.** (AIR 2007 SC 285) and in **Union of India and another v. M.P.Gupta** [2004) 10 SCC 504]. Sri.Alexander Thomas also placed before me copy of the order of this Court in A.R.No.6 of 2007 wherein this Court appointed three persons from the panel submitted by the Standing Counsel for the Railways in a similar dispute as arbitrators.

5. The issue is whether the 2nd respondent having failed to exercise the power to appoint arbitrators within 30 days of Annexure-A2 is entitled now, after the contractor has moved the Court, to insist that the choice of the arbitrator shall be theirs and the issue accordingly has to be answered in the negative.

6. A Full Bench of this Court answering a reference which was

necessitated in view of a conflict between judgments of Division Benches in **Divisional Railway Manager v. West Coast Agencies** (2005 (2) KLT 734) and **National Thermal Power Corporation Ltd. v. Raghul Constructions (P) Ltd.** (2005 (1) KLT 763) over the issue as to whether the Railways will have the right to appoint an arbitrator by virtue of Clauses 63 and 64 of GCC after the institution of arbitration request by the contractor before the High Court, held, approving the decision in **Divisional Railway Manager's** case (2005 (2) KLT 734), that the Railways will not have the authority once the Chief Justice is moved by the contractor under Section 11 of the Act. I had occasion to consider this issue in detail in my common order in A.R.Nos.36, 37 and 38 of 2005 to which also the Railways was a party. In fact, para.5 of the judgment in **Union of India v. M/s.V.S.Engineering (P) Ltd.** (AIR 2007 SC 285) itself reiterates the position.

7. At any rate, I do not think that any prejudice whatsoever will be occasioned to the parties by appointing a retired Judge of this Court known for his integrity.

8. The result is that the Arbitration Request will stand allowed.

Mr.Justice M.M.Pareed Pillay, Former Chief Justice of this Court is appointed as Arbitrator. He will adjudicate on all the claims which are subject-matter of Annexures-A1 and A2. The Arbitrator will commence the proceedings early and pass award at his earliest.

tgl/- **(PIUS C. KURIAKOSE, JUDGE)**